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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GENE MYERS, Guardian Ad Litem, *Petitioner*

v.

SHAWN KATHLEEN LEWIS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the fundamental constitutional right to privacy extends to an abortion where the woman's physician has determined, in the exercise of his best medical judgment, that the abortion is not necessary for the well-being of the patient?

2. Whether, given the state's strong interests in preserving unborn human life, in preferring childbirth over abortion, and in protecting the right of the husband to the care, custody, and companionship of his child, a trial court may properly enjoin a woman from obtaining an abortion which is not medically necessary for her well-being?

3. Whether the holding in *Roe v. Wade*, employed to extend constitutional protection to abortion, should be reconsidered in light of subsequent legal scholarship and unforeseen pernicious effects of that opinion?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Gene Myers, Guardian Ad Litem for Unborn Child Lewis, the father of Unborn Child Lewis, Carlton James Lewis, and the respondent Shawn Kathleen Lewis.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
I. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRIVACY EXTENDS TO AN ABORTION WHERE THE WOMAN'S PHYSICIAN HAS DETERMINED, IN THE EXERCISE OF HIS BEST MEDICAL JUDGMENT, THAT THE ABORTION IS NOT NECESSARY FOR THE WELL-BEING OF THE PATIENT?	7
A. *ROE V.WADE*, *DOE V. BOLTON*, AND THEIR PROGENY RECOGNIZED CONSTITUTIONAL PROTECTION, AS A "FUNDAMENTAL" RIGHT, ONLY FOR ABORTIONS MEDICALLY "NECESSARY" FOR THE "WELL-BEING OF THE PATIENT"	7
1. *ROE V. WADE* HELD THAT THE ABORTION RIGHT IS NOT ABSOLUTE, AND	

THAT IT IS "INHERENTLY, AND PRIMARILY, A MEDICAL DECISION, AND BASIC RESPONSIBILITY FOR IT MUST REST WITH THE [WOMAN'S] PHYSICIAN" 8

2. *DOE V. BOLTON* DEFINED THE CONCEPT OF THE MOTHER'S "HEALTH" BROADLY BUT LIMITED CONSTITUTIONAL PROTECTION TO CASES WHERE "MEDICAL JUDGMENT" HAD DECIDED THAT AN ABORTION WAS APPROPRIATE 10

3. SUBSEQUENT ABORTION DECISIONS OF THIS COURT HAVE REAFFIRMED THE REQUIREMENT OF *ROE* AND *BOLTON* THAT ABORTION DECISIONS BE BASED ON A MEDICAL JUDGMENT OF NECESSITY FOR THE WELL-BEING OF THE MOTHER 12

II. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT, DESPITE THE STATE'S STRONG INTERESTS IN PRESERVING UNBORN HUMAN LIFE, IN PREFERRING CHILDBIRTH OVER ABORTION, AND IN PROTECTING THE RIGHT OF THE HUSBAND TO THE CARE, CUSTODY, AND COMPANIONSHIP OF HIS CHILD, A TRIAL COURT MAY NOT PROPERLY ENJOIN A WOMAN FROM OBTAINING AN ABORTION WHICH IS NOT MEDICALLY NECESSARY FOR HER WELL-BEING? 13

A. THE UNBORN CHILD HAS RIGHTS AND INTERESTS RECOGNIZED IN BOTH *ROE* AND GENERAL JURISPRUDENCE 13

B. THE APPROPRIATE LEGAL ANALYSIS IN THE PRESENT CASE IS THE SUBSTANTIVE DUE PROCESS ANALYSIS EMPLOYED BY THIS COURT IN ITS ABORTION CASES 16

C. UNDER THE APPROPRIATE LEGAL ANALYSIS, THE ACTION OF THE TRIAL COURT IN ENJOINING THE ABORTION WAS NOT CONSTITUTIONALLY INFIRM 18

III. WHETHER THIS COURT SHOULD DECIDE THAT THE HOLDING IN *ROE V. WADE*, EMPLOYED TO EXTEND CONSTITUTIONAL PROTECTION TO ABORTION, SHOULD BE RECONSIDERED IN LIGHT OF SUBSEQUENT LEGAL SCHOLARSHIP AND UNFORESEEN, PERNICIOUS EFFECTS OF THAT OPINION? 19

CONCLUSION 26

APPENDIX 1a

TABLE OF AUTHORITIES

United States Supreme Court Cases: *Page(s)*

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 12, 16, 20, 24

Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 22

Boys Market, Inc. v. Retail Clerks, 498 U.S. 235 (1970) 21

Burnet v. Colorado Oil and Gas Co., 285 U.S. 393 (1932) 25

Carey v. Population Services International, 431 U.S. 678 (1977) 6, 12

Colautti v. Franklin, 439 U.S. 379 (1978) 12

Doe v. Bolton, 410 U.S. 179 (1973) 2, 6, 7, 8, 10-12, 19

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 20

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 20

Glidden Co. v. Zdanok, 370 U.S. 64 (1962) 20

Harris v. McRae, 448 U.S. 297 (1980) 7, 15

Honig v. Doe, 108 S.Ct. 592 (1988) 2

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 20

Maher v. Roe, 432 U.S. 464 (1977) 7, 14-17

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) 21, 24

Monnell v. Dep't of Social Servs., 436 U.S. 658 (1978) .. 24

Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476 (1983) 16

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 2, 5, 23

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

Simopoulos v. Virginia, 462 U.S. 506 (1983)..... 16, 20

Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.Ct. 2169 (1986)..... 13, 23

Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 24-25

Vazquez v. Hillery, 474 U.S. 254 (1986)..... 21

Michigan Cases:

O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971). 14

People v. Bricker, 389 Mich. 524, 208 N.W.2d 172 (1973) 14

Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1976) 23

Other Cases:

American Academy of Pediatrics v. Heckler, 561 F.Supp. 395 (D.D.C. 1983)..... 24

Bouvia v. Superior Court, 179 Cal.App.3d 1127, 225 Cal.Rptr. 297 (Cal.Ct.App. 1986) 24

Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972) ... 23

Conn v. Conn, No. 73C01-8806-DR-127, slip op. (Shelby County [Ind.] Cir. Ct. June 27, 1988), *rev'd* 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd and opinion of app. ct. adopted by order*, No. 73S01-8807-CV-631 (Ind. July 15, 1988), *petition for cert. filed*, (U.S. Aug. 24, 1988) (No. 88-347) 10

In the Matter of Unborn Child H., No. 84C01-8804-HP-185, slip op. (Vigo County [Ind.] Cir. Ct., Apr. 8, 1988), *appeal pending sub nom Doe v. Smith*, No.84A01-8804-CV-00112 (Ind. Ct. App. 1988) 10

In re the Treatment and Care of Infant Doe, No. GU-8204-004A, slip op. at 2 (Monroe County [Ind.] Cir. Ct., Apr. 12, 1983), Petition for Writ of Mandamus and

Prohibition, *denied sub nom. State of Indiana ex rel Infant Doe v. Monroe Circuit Court*, No. 482S 140 (Ind. Apr. 14, 1983), *cert. denied* 104 S.Ct. 394 (1983), *reprinted in* 2 Issues in Law & Medicine 77 (1986)..... 23-24

Turpin v. Sortini, 31 Cal.3d 220, 643 P.2d 954, 182 Cal.Rptr. 337 (1982)..... 24

Michigan Statutes:

Mich. Comp. Laws Ann. § 600.2045 (West 1968) 14

1987 Mich. Pub. Acts 59 15

Miscellaneous Authorities:

A. Bickel, *The Morality of Consent* (1975) 22

A. Cox, *The Role of the Supreme Court in American Government* (1976)..... 22

Editors' Preface, 77 Mich. L. Rev. (no number) (1979).. 22

J. Ely, *The Wages of Crying Wolf:A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973)..... 21

Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sp.Ct. Rev. 159 22

Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 Mich. L. Rev. 1724 (1979) 22

Pfeiffer, "Abandoning Error: Self-Correction by the Supreme Court," *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* (Horan, Grant & Cunningham eds. 1987)..... 25-26

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Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. Rev. 231 21-25

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v.

SHAWN KATHLEEN LEWIS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Petitioner Gene Myers, Guardian Ad Litem for Unborn Child Lewis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Michigan Court of Appeals, entered in *Lewis v. Lewis and Myers* on September 15, 1988.

OPINIONS BELOW

The Order of the Michigan Supreme Court (not reported) refusing to review the opinion of the Michigan Court of Appeals is reprinted in the appendix hereto, p. 1a, *infra.*

The opinion of the Michigan Court of Appeals (not reported) is reprinted in the appendix hereto, p. 3a, *infra.*

The Stipulated Findings of Fact and Conclusions of Law of the Genessee County Circuit Court is reprinted in the appendix hereto, p. 7a, *infra.*

JURISDICTION

Carlton James Lewis, father of Unborn Child Lewis (the Father herein) initiated this action in the Genesee County [Mich.] Circuit Court, invoking the equitable and statutory injunctive powers of the court to consider his rights and interests in the unborn child against those of Shawn Kathleen Lewis (the Mother herein) in aborting the child and to determine, based on the relevant weight of those rights and interests, whether the Mother should be allowed to obtain an abortion or be enjoined. The Father argued before the circuit court that *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), did not preclude such an action. A temporary restraining order was issued by the trial court.

The Mother promptly asserted an absolute constitutional right to an abortion, whether or not there was a medical judgment of necessity for her well-being, relying on *Roe*. Plaintiff's Brief in Support of Motion to Dissolve Ex-parte Preliminary Injunction at 5. Upon a hearing, the trial court issued a preliminary injunction, barring the Mother from aborting the child, on September 6, 1988. Appendix, pp. 18a-19a. Gene Myers was appointed Guardian Ad Litem. Appendix, p. 19a.

On the Mother's appeal, the Michigan Court of Appeals, on September 15, 1988, entered a judgment ordering the preliminary injunction dissolved. Appendix, p. 3a. On September 22, 1988, the Michigan Supreme Court issued an order refusing to grant leave to appeal. Appendix, p. 1a. No rehearing was sought.

The Jurisdiction of this Court to review the judgment of the Michigan Court of Appeals is invoked under 28 U.S.C. § 1257(3) based on the assertion of the Respondent of rights under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States . . . are citizens of the United States . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case was commenced by the filing of a Complaint for Divorce by the Mother, on January 20, 1988. "From approximately late May [, 1988,] through mid July, [1988,] the parties engaged in sexual intercourse, unprotected, although at previous times, the parties had used contraceptives." Defendant's Response to Plaintiff's Brief in Support of Motion to Dissolve Ex-parte Preliminary Injunction at vi.

On or about August 8, 1988, the Mother informed her husband, the Father, that she was seven or eight weeks pregnant and intended to have an abortion. The Mother does not dispute that her husband is the father of the child.

On August 9, 1988, on the Father's motion, the Genesee County [Michigan] Circuit Court issued a Temporary Restraining Order, ex parte, prohibiting the Mother from obtaining an abortion.

The constitutional issue herein was raised in the circuit court when counsel for the Mother claimed that there were medical indications for the abortion only to concede later that such a claim could not be documented, and, rather, the woman's attending physician had made the medical judgment that this abortion was not medically necessary for the well-being of the Mother. Appendix, p. 8a. *See also* Appendix, p. 20a, (trial court exhibit of statement by physician). The trial court had declared

that he would dissolve the injunction if evidence of medical necessity could be produced, noting that *Roe* required the medical judgment of the woman's attending physician that the abortion was necessary for her well-being. Appendix, p. 8a. The Mother asserted an absolute right to an abortion even where her physician had declared it not necessary for her well-being. Brief in Support of Motion to Dissolve Ex-Parte Preliminary Injunction at 5.

On September 6, 1988, the Circuit Court conducted a hearing and issued a statement of facts disclosing that the abortion sought was not medically necessary for the well-being of the Mother, because her attending physician indicated that the abortion decision "was specifically a social decision as opposed to a medical decision to terminate the pregnancy." Appendix, p. 8a, 20a. The circuit court did not reach the issue of paternal rights in the abortion context, because it decided the case on the basis that *Roe* did not extend constitutional protection to the abortion proposed herein. Appendix, p. 16a.[1]

On September 6, 1988, therefore, the Circuit Court issued a Preliminary Injunction prohibiting Mother from having an abortion and certified the Order as a "Final Order For Purposes of Appeal There Being No Just Cause For Delay." The Court also appointed attorney Gene Myers as Guardian Ad Litem for the Unborn Child during the pendency of this matter.

The constitutional issue of the scope of the abortion privacy right was presented to the Michigan Court of Appeals in the Guardian Ad Litem's Brief before that Court. The issues stated therein were as follows:

> 1. Does the constitutional right to privacy extend to an abortion where the woman's physician has not deter-

[1] The trial court distinguished *Roe* from the instant case on the basis of factors which are not argued herein. The asserted distinction between *Roe* and this case is the lack of medical necessity, as determined by the Mother's attending physician, for the abortion herein. Thus, *Roe* does not extend constitutional protection to the abortion proposed herein, which is the basis upon which this Court should uphold the injunction.

mined, in the exercise of his best medical judgment, that the abortion is necessary for the well-being of the patient?

2. In light of the state's strong interest in preserving unborn life, in preferring childbirth over abortion, and in protecting the right of the husband to the care, custody, and companionship of his child, may a trial court properly enjoin a non-medically indicated abortion?

That Court held, in a one sentence opinion, on September 15, 1988, that the injunction was ordered dissolved as violative of the Mother's constitutional right to an abortion as declared in *Roe* and *Danforth*. Appendix, p. 3a.

On September 15, 1988, the Michigan Supreme Court granted appeliants' motion for immediate consideration of their application for leave to appeal and ordered any further briefing to be submitted by 5:00 p.m. on September 20, 1988. The constitutional issues were raised in virtually identical language to that employed in the Court of Appeals in the Guardian Ad Litem's Brief before that court.

On September 22, 1988, the Michigan Supreme Court refused to review the Court of Appeals decision but extended its stay until Monday, September 26, 1988 at 5:00 p.m.

Thus, the federal constitutional issues, under the Fourteenth Amendment, have been raised in this case from its inception. With the final decision of the highest state court now issued, this case is ripe for consideration of the important constitutional issues raised herein.[2]

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[2] On Monday, September 26, 1988, this Court denied the Guardian Ad Litem's Application for a Stay Pending Certiorari review. The Guardian Ad Litem has received no notice that an abortion of Unborn Child Lewis has occurred, but, if it has, this case is clearly within the exception to the mootness doctrine for matters "capable of repetition yet evading review," as that doctrine is employed in abortion cases. *Cf. Roe*, 410 U.S. at 125; *Doe v. Bolton*, 410 U.S. 179, 187 (1973); *Honig v. Doe*, 108 S.Ct. 592, 609 (1988) (Scalia, J., concurring) (abortion jurisprudence "differ[s] . . . in dispensing with the same-party requirement). Moreover, the case at bar was timely

(Footnote continued)

REASONS FOR GRANTING THE WRIT

This Petition should be granted because the Michigan Court of Appeals erred in ordering the injunction prohibiting the abortion dissolved, based on its incorrect interpretation of *Roe v. Wade* and its progeny. This erroneous interpretation is evident in the discussion below of the issues raised in this appeal.

The argument may be succinctly summarized. The Mother and Father had sexual relations during an attempted period of marital reconciliation, from which she is now in her first trimester of pregnancy. She consulted with her personal physician who advised her that the abortion she sought was not medically necessary for her well-being. The Father sought an injunction to prevent her from aborting their child which he won from the trial court.

The Guardian defends the trial court decision on the basis that the Mother has no "fundamental" constitutional right to an abortion where her physician has determined the abortion sought is not medically necessary for her well-being. This Court has declared, "[T]he abortion decision *necessarily* involves a *medical judgment*." *Carey v. Population Services International*, 431 U.S. 678, 699 n.25 (1977) (citing *Roe*, 410 U.S. at 164) (emphasis added). The only evidence adduced in the trial court is contrary to this requirement. Rather, the Mother asserts her absolute right to an abortion on demand, which was explicitly rejected by this Court. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 189 (1973).

Therefore, as the Mother has no fundamental right to this abortion, on the facts of this case, the state need not show a compelling interest, but only that it has a constitutionally

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Footnote 2 continued

brought before this Court on an Application for Stay. But for the action of this Court in denying the Application, the case could have been heard without any consideration of mootness. Finally, the Mother has conceded that this case is within the exception to the mootness doctrine, if an abortion should occur, in her Response to Petitioner's Application for a "Stay" Pending Petition for Certiorari to the Michigan Supreme Court, at 3-4 n.2.

permissible purpose and that its action is rationally related to that purpose. The state has legitimate interests in protecting the life of the unborn, *Roe*, 410 U.S. at 159, 163, and in preferring childbirth over abortion. *Maher v. Roe*, 432 U.S. 464, 474 (1977); *Harris v. McRae*, 448 U.S. 297, 314 (1980). The injunction herein was rationally related to the permissible state purpose of furthering these interests. Therefore, the trial court's action in enjoining this abortion was constitutionally permissible and required to protect the interests of the unborn child.[3]

I. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRIVACY EXTENDS TO AN ABORTION WHERE THE WOMAN'S PHYSICIAN HAS DETERMINED, IN THE EXERCISE OF HIS BEST MEDICAL JUDGMENT, THAT THE ABORTION IS NOT NECESSARY FOR THE WELL-BEING OF THE PATIENT?

The Michigan Court of Appeals has held, on the basis of *Roe* and the subsequent abortion cases of this Court, that a woman has a fundamental right to an abortion, in her first trimester, even where her attending physician has consulted with his patient and determined that the abortion sought by the Mother is not medically necessary for her well-being. This was not the holding of *Roe* and the subsequent abortion cases of this Court.

A. *ROE V. WADE, DOE V. BOLTON*, AND THEIR PROGENY RECOGNIZED CONSTITUTIONAL PROTECTION, AS A "FUNDAMENTAL" RIGHT, ONLY FOR ABORTIONS MEDICALLY "NECESSARY" FOR THE "WELL-BEING OF THE PATIENT."

In 1973, this Court recognized federal constitutional protection, as a "fundamental" right, for abortions medically neces-

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[3] The Guardian Ad Litem for the Unborn Child in the case at bar, Attorney Gene Myers, has determined, pursuant to the responsibilities entrusted to him by the Circuit Court for the County of Genesee, that the best interests of Unborn Child Lewis would be served if he or she were carried to term and not aborted.

sary for the well-being of the mother in two companion cases: *Roe v. Wade* and *Doe v. Bolton*. In both cases, as well as in their progeny, this Court has consistently recognized the necessary role of a physician and his medical judgment in determining whether an abortion is medically appropriate. Only in cases where an abortion is medically indicated to protect the health of the woman does a woman have a fundamental right to an abortion which requires special heightened constitutional scrutiny by the courts.

1. *ROE V. WADE* HELD THAT THE ABORTION RIGHT IS NOT ABSOLUTE, AND THAT IT IS "INHERENTLY, AND PRIMARILY, A MEDICAL DECISION, AND BASIC RESPONSIBILITY FOR IT MUST REST WITH THE [WOMAN'S] PHYSICIAN."[1]

The right to abortion is not absolute. This Court in *Roe* expressly and emphatically rejected the assertion of certain *amici* that a woman had a right to do with her body as she pleased. The Court declared:

> The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. [citations omitted]
>
> We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

410 U.S. at 154.

In *Roe*, this Court repeatedly emphasized the essential role of medical judgment in the abortion decision. After listing factors that might lead a woman to desire an abortion, this

[1] 410 U.S. at 166.

Court declared: "All these are factors the woman and her *responsible physician* necessarily will consider in consultation." *Id.* at 153. (emphasis added).

The *Roe* Court reiterated the necessity of medical judgment in the decision: "[F]or the period of pregnancy prior to [the end of first trimester], the *attending physician, in consultation* with his patient, is free to determine, without regulation by the state, that *in his medical judgment*, the pregnancy should be terminated." *Id.* at 163 (emphasis added).

In the summary of its holding, the *Roe* Court repeated the cruciality of the physician's medical judgment in the abortion decision: "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the *medical judgment* of the pregnant woman's *attending physician.*" *Id.* at 164 (emphasis added).

The *Roe* Court repeated its emphasis on the the centrality of a medical judgment in the abortion decision again in its summary:

> The decision vindicates the the *right of the the physician* to administer *medical treatment* according to his *professional judgment* up the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is *inherently, and primarily, a medical decision*, and *basic responsibility for it must rest with the physician. If an individual practioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.*

Id. at 166 (emphasis added).

Thus, it is plain from the *Roe* decision that a medical judgment by the woman's attending physician that an abortion is medically indicated for the protection of her health is a *sine qua non* of constitutional protection for the abortion decision. Absent such a judgment of medical necessity, as in the case at

bar, there is no constitutional right to an abortion for the Mother herein.[5]

2. *DOE V. BOLTON* DEFINED THE CONCEPT OF THE MOTHER'S "HEALTH" BROADLY BUT LIMITED CONSTITUTIONAL PROTECTION TO CASES WHERE "MEDICAL JUDGMENT" HAD DECIDED THAT AN ABORTION WAS APPROPRIATE.[6]

In the companion case to *Roe*, *Doe v. Bolton*, 410 U.S. 179, this Court reaffirmed the principle that the abortion right is not absolute: "a pregnant woman does not have an absolute constitutional right to have an abortion *on her demand.*" *Id.* at 189 (emphasis added).

Thus, abortion on demand was clearly not recognized by this Court as having constitutional protection. Rather, the right extends only to abortions which are medically necessary for the well-being of the mother in the sound medical judgment of the attending physician.

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[5] The class of abortions beyond the constitutional protection of *Roe* may be illustrated by judicially determined reasons asserted in recent "father's rights" cases. In one case, the trial court found the reasons for seeking an abortion included the desire not to be pregnant in the *summertime*, so as to look good in a bathing suit and not have an impaired summer social life, and not wanting to share the father with anyone, including their baby. *In the Matter of Unborn Child H*, No. 84C01-8804-HP-185, slip op. at 2 (Vigo County [Ind.] Cir. Ct., Apr. 8, 1988), *appeal pending sub nom Doe v. Smith*, No. 84A01-8804-CV-00112 (Ind. Ct. App. 1988).

In another "father's rights" case, now before this Court on a petition for certiorari, the trial court found that the mother was willing to carry the child to term if she could be sure her husband, against whom she had filed a marriage dissolution action, could not gain custody of the child when born. She said she would carry the child to term if her husband would agree to put the child up for adoption by a third party, foreign to the marriage. *Conn v. Conn*, No. 73C01-8806-DR-127, slip op. at 4 (Shelby County [Ind.] Cir. Ct. June 27, 1988), *rev'd*, 525 N.E.2d 612 (Ind. Ct. App 1988), *aff'd and opinion of app. ct. adopted by order*, No. 73S01-8807-CV-631 (Ind. July 15, 1988), *petition for cert. filed*, (U.S. Aug. 23, 1988) (No. 88-347).

[6] 410 U.S. at 191-92.

This was made clear in this Court's upholding of a Georgia statute making it "a crime for a physician to perform an abortion except when . . . it is 'based upon his best clinical judgment that an abortion is necessary.' " *Id.* at 191 (citation omitted). The statute had been challenged on the basis that "necessary" was unconstitutionally vague. This Court construed the concept of necessary for the mother's health broadly, including "all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient." *Id.* at 192. Using this broad construction of the concept of health, the Court rejected the vagueness challenge. *Id.*

Although the *Bolton* Court defined broadly the concept of what is necessary for a woman's health, the Court did not reject the necessity of a medical judgment that an abortion must be medically indicated (even under the broad definition) in order to be constitutionally protected. This Court summarized the effect of the district court's decision, which it affirmed, as follows:

> The net result of the District Court's decision is that the abortion decision, so far as the physician is concerned, is made in the exercise of his professional, that is, his 'best clinical,' judgment in the light of *all* the attendant circumstances. He is not now restricted to the three situations originally specified. Instead he may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him.

Id. at 191 (emphasis in original). The *Bolton* Court noted that "[t]his allows the attending physician the room he needs to make his *best medical judgment*." *Id.* at 192 (emphasis added).

That this Court requires that the abortion decision be subject to the best medical judgment of the attending physician was further confirmed by the Court's discussion of the Georgia requirement that two physicians concur as to medical necessity. The Court declared: "The statute's emphasis, as has been repetitively noted, is on the *attending physician's 'best clinical*

judgment that an abortion is necessary.' That should be sufficient." *Id.* at 199 (emphasis added).

Chief Justice Burger in a concurrence to *Bolton* made it absolutely clear that the Court was mandating a physician's determination of medical necessity for the well-being of the mother and rejecting abortion on demand.

> [T]he vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand.

Id. at 208 (Burger, C.J., concurring).

3. SUBSEQUENT ABORTION DECISIONS OF THIS COURT HAVE REAFFIRMED THE REQUIREMENT OF *ROE* AND *BOLTON* THAT ABORTION DECISIONS BE BASED ON A MEDICAL JUDGMENT OF NECESSITY FOR THE WELL-BEING OF THE MOTHER.

Subsequent decisions of this Court have upheld the principle that constitutional protection, as a fundamental right, only extends to abortions medically necessary for the well-being of the mother. In *Carey v. Population Services International*, this Court declared that "the abortion decision necessarily involves a medical judgment." 431 U.S. at 699 n.25 (citing *Roe*, 410 U.S. 113).

Likewise, in *Colautti v. Franklin*, this Court recognized the centrality of the physician in making the abortion decision based on his medical evaluation and reasserted its earlier declaration that determinations of viability, for purposes of the *Roe* trimester framework, were "a matter of medical judgment . . . ." 439 U.S. 379, 388-94 (1978)(citation omitted). Also, in *Akron v. Akron Center for Reproductive Health*, the Court reaffirmed the central role of the physician in the decision-making process and the medical nature of the procedure. 462 U.S. 416, 426 (1983). In the most recent abortion case

decided by a majority of the Court, it was again recognized that a woman must make her decision "with the advice of her physician." *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, 2178 (1986).

Thus, it is clear that only abortions medically necessary for the well-being of the mother have constitutional protection, as fundamental rights, requiring a state to demonstrate a compelling interest, under the holding of *Roe* and its progeny. The case at bar presents only a desire for an abortion on demand which is not constitutionally protected.

II. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT, DESPITE THE STATE'S STRONG INTERESTS IN PRESERVING UNBORN HUMAN LIFE, IN PREFERRING CHILDBIRTH OVER ABORTION, AND IN PROTECTING THE RIGHT OF THE HUSBAND TO THE CARE, CUSTODY, AND COMPANIONSHIP OF HIS CHILD, A TRIAL COURT MAY NOT PROPERLY ENJOIN A WOMAN FROM OBTAINING AN ABORTION WHICH IS NOT MEDICALLY NECESSARY FOR HER WELL-BEING?

A. THE UNBORN CHILD HAS RIGHTS AND INTERESTS RECOGNIZED IN BOTH *ROE* AND GENERAL JURISPRUDENCE.

Two interests relevant for consideration herein are: (1) the unborn child's interest in life and (2) the interest of the state in encouraging childbirth over abortion.[7]

The first interest was recognized in *Roe* itself, where this Court declared that the state has a legitimate interest in protecting the life of the unborn. 410 U.S. at 159, 163. The *Roe* Court declared this interest to be "important and legitimate"

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[7] The interest of the Father herein also bears consideration in a case where the mother's physician has determined that there is no medical necessity for the abortion to protect her well-being. This interest is not addressed in this petition.

throughout pregnancy. *Id.* at 162. This right is not limited or overridden by the health interests of the mother where, as in this case, the woman's physician has determined that her desired abortion is not medically necessary for her well-being.

The Michigan Supreme Court has also recognized this interest in protecting fetal life in the case of *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971). The *O'Neill* court expressly overruled an earlier decision holding that the unborn were not "persons" within the meaning of the wrongful death act. The court declared: "The fact of life is not to be denied. Neither is the wisdom of the public policy which regards unborn persons as being entitled to the protection of the law." *Id.* at 137, 188 N.W.2d at 788. The *O'Neill* court further declared that the statute authorizing guardians ad litem "for unborn persons," Mich. Comp. Laws Ann. § 600.2045 (West 196), "constitutes a legislative recognition of the *personhood* of the unborn." 385 Mich. at 137, 188 N.W.2d at 788 (emphasis in original).[8] In a powerful summation of its discussion of the personhood of the unborn, the Michigan Supreme Court declared:

> If property interests of unborn persons are protected by the law, how much more solicitous should the law be of the first unalienable right of man — the right to life itself?

Id. at 138, 188 N.W.2d at 788.

The Michigan Supreme Court also recognized, in *People v. Bricker*, 389 Mich. 524, 528, 208 N.W.2d 172, 175 (1973), that it is the public policy of the State of Michigan to proscribe abortion except to preserve the life of the mother. It acknowledged the effect of the federal supremacy clause in overriding this interest, but only where the abortion was "authorized by a pregnant woman's attending physician in the exercise of his medical judgment." *Id.*

The second interest, the state's interest in preferring childbirth over abortion, was recognized in *Maher v. Roe*, 432 U.S.

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[8] It is this same guardian ad litem statute which authorizes Gene Myers, as Guardian Ad Litem herein, to assert the rights of Unborn Child Lewis.

at 474, and *Harris v. McRae*, 448 U.S. at 314. These cases hold that the state may even implement this interest by preferring childbirth over abortion in its choice of funding for indigent women.

Michigan has made clear its public policy of preferring childbirth over abortion by the recent passage of a statute proscribing abortion funding. The statute declares:

> Section 109a. Notwithstanding any other provision of this Act, an abortion shall not be a service provided with public funds to a recipient of welfare benefits, whether through a program of medical assistance . . . or any other type of public aid or assistance program, unless the abortion is necessary to save the life of the mother. It is the public policy of this state to prohibit the appropriation of public funds for the purpose of providing an abortion to a person who receives welfare benefits unless the abortion is necessary to save the life of the mother.

1987 Mich. Pub. Acts 59 (amending Social Welfare Act of 1937, 1937 Mich. Pub. Acts 280). Thus, Michigan has adopted the public policy, recognized as legitimate in *Maher* and *McRae*, of preferring childbirth over abortion.

For purposes of Michigan law, where *Roe* and its federal constitutional principles do not impinge, the unborn are persons with a right to life. As *Roe* and its progeny do not sanction non-medically indicated abortions, the Unborn Child in this case is a person entitled to a right to life.

Thus, Michigan has recognized state interests in preferring childbirth over abortion and in protecting unborn human life, both interests found legitimate by *Roe* and its progeny. These legitimate interests are asserted herein in support of the injunction issued by the trial court.

B. THE APPROPRIATE LEGAL ANALYSIS IN THE PRESENT CASE IS THE SUBSTANTIVE DUE PROCESS ANALYSIS EMPLOYED BY THIS COURT IN ITS ABORTION CASES.

In *Roe*, this Court used a substantive due process analysis under the Fourteenth Amendment of the Constitution to determine that the right to abortion was constitutionally protected, where medically indicated and properly balanced against competing state interests. 410 U.S. at 153. This analysis has been consistently employed in subsequent abortion cases before the Court.

Under substantive due process analysis, where a state action unduly impinges on a fundamental right, the state must normally show a compelling state interest to justify such a burden and the action must be narrowly tailored to meet the state's compelling interest. *Maher v. Roe*, 432 U.S. at 473-74.

However, in the abortion context, the test has been modified due to the presence of the life of the unborn child. The state must meet a less strenuous "reasonably related" test rather than the "narrowly tailored" test. This formulation is evident in numerous cases.[9]

Furthermore, the "compelling interest" test is only applied where there is a *fundamental* right which is "unduly" burdened. *Maher*, 432 U.S. at 473-74. In *Maher*, the plaintiff argued that a woman had a fundamental right to government funding of her abortion and that denial of such funding was not justified by a compelling state interest.

The *Maher* Court held, however, that there was no fundamental right to government funding of abortion, and, there-

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[9] The test was first set forth in *Roe*, where the Court noted that, when the state has a compelling interest to "unduly" burden, *Maher*, 432 U.S. at 473-74, a fundamental right, the action of the state must be *reasonably related to* that interest. 410 U.S. at 163. *See also Akron*, 462 U.S. at 416, 431-32, 434, 438, 449 (1983); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476, 482, 485, 487, 488 n.12 (1983); *Simopoulos v. Virginia*, 462 U.S. 506, 511, 519 (1983).

fore, a "rationality" test was to be employed rather than a "compelling interest" test. In full, the applicable test in *Maher* was whether the state's action was " 'rationally related' to a 'constitutionally permissible' purpose." *Id.* at 478 (citations omitted).

The *Maher* Court held that, because the state "unquestionably ha[d] a 'strong and legitimate interest in encouraging normal childbirth,' an interest honored over centuries," *id.*, and, because the policy of funding childbirth but not abortion (for indigent women) rationally furthered that interest, the state action in *Maher* met the test of rationality and was constitutionally sound. *Id.*

In the present case, as set forth previously, there is no fundamental constitutional right to an abortion which is not medically necessary for the well-being of the Mother. Because the facts of this case establish that there is no medical indication for an abortion, the woman's interest in abortion is not a fundamental right.

Therefore, in the instant case, the state need not demonstrate a compelling interest for its action in enjoining effectuation of the Mother's nonfundamental abortion interest. If the Mother has any constitutionally protected interest in abortion, it is a nonfundamental liberty interest under the Fourteenth Amendment. The rational basis test is applicable.

The issue in the case at bar is whether the action of the state court, in enjoining an abortion not medically necessary for the well-being of the Mother, is rationally related to a constitutionally permissible purpose. As will be shown, this test is easily met, making the action of the trial court not constitutionally infirm.

As noted previously, the state has a permissible purpose in asserting the interest of the state in preferring childbirth over abortion and the interest in unborn human life. These are legitimate state purposes to which the action of the trial court in enjoining the abortion was rationally related.

C. UNDER THE APPROPRIATE LEGAL ANALYSIS, THE ACTION OF THE TRIAL COURT IN ENJOINING THE ABORTION WAS NOT CONSTITUTIONALLY INFIRM.

In the instant case, the action of the trial court in enjoining an abortion which was sought for reasons other than medical necessity to protect the health of the Mother (even employing the broad definition of health in *Bolton*) was rationally related to legitimate state purposes. Therefore, it was not an unconstitutional action.

In the trial court, the Mother asserted a constitutional right to abortion, free from any restriction based on the assertion of other interests. In order to be successful in her claim, she had an initial evidentiary burden to produce evidence sufficient to show that she was within the claimed constitutional protection. Indeed the trial court declared that the injunction would be dissolved if medical indications for an abortion could be established. In this case,the Mother's counsel initially claimed that there was a medical indication for the abortion. This initial claim proved to be groundless upon consultation with the client and her attending physician, and counsel was forced to concede to the trial court that there were no medical reasons for the abortion. On the contrary, the only evidence adduced in this case was that the Mother's physician said, "It is a social decision not a medical decision for a T.O.P. [termination of pregnancy] with this patient." Statement of John L. Stoker, D.O. *See* Appendix, p. 20a.

This concession by counsel for the Mother is the hinge on which this case turns. With the record closed by the Mother's request that the preliminary injunction be certified as a final order, the only evidence is the medical opinion of the Mother's attending physician, who, in his best clinical judgment, declared that this abortion is not medically necessary for the well-being of the Mother.

Thus, we have, in the instant case, an abortion being sought for no health reason whatsoever. Given the broad notion of

health employed in abortion jurisprudence, this abortion is among the most elective of elective abortions — a class of abortions not within the "fundamental right" protection of the United States Constitution. This case is about a woman seeking abortion on demand, which was rejected by this Court. *Bolton*, 410 U.S. at 189 ("[A] pregnant woman does not have an absolute right to an abortion on her demand.").

In such a context, the state court was constitutionally permitted to enjoin the abortion upon the assertion of legitimate competing interests, namely, (1) the interest of the state in preferring childbirth over abortion and (2) the interest of the Unborn Child in being carried to term and not aborted.

Was the action of the trial court rationally related to these legitimate state interest? Clearly, a constitutionally permissible action which specifically furthers these interests by preventing an abortion is rationally related to these state interests. It is obvious that the action directly effected the end sought.

In sum, the trial court acted correctly in enjoining the abortion sought by the Mother herein. Her desired abortion is outside the realm of constitutional protection and is therefore subject to state action to promote legitimate state purposes which are rationally related to those purposes, such as those asserted herein.

III. WHETHER THIS COURT SHOULD DECIDE THAT THE HOLDING IN *ROE V. WADE*, EMPLOYED TO EXTEND CONSTITUTIONAL PROTECTION TO ABORTION, SHOULD BE RECONSIDERED IN LIGHT OF SUBSEQUENT LEGAL SCHOLARSHIP AND UNFORESEEN, PERNICIOUS EFFECTS OF THAT OPINION?

If *Roe* does control the present case, giving the Mother a right to abortion on demand, even though her physician has determined that the abortion she seeks is not medically necessary for her well-being, then this Court should reconsider its holding in *Roe*. Such reconsideration would be appropriate

because of the unforeseen, pernicious effects of *Roe* and because subsequent legal scholarship has demonstrated that the foundations upon which the *Roe* Court built its opinion have been demolished by more extensive and detailed analysis.

While considerations of stare decisis weigh more heavily in the area of statutory construction, because the legislature is free to alter the construction, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), this is not true in constitutional interpretation where change may only be made by the difficult process of constitutional amendment or reconsideration by this Court. *See Akron*, 462 U.S. at 420; *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962). Where "the unconstitutionality of the course pursued has . . . been made clear," this Court is "compel[led]" to disregard stare decisis. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938).

Justice Harry Blackmun, writing for the Court, acknowledged this principle in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1985). He wrote that this Court has readily reconsidered precedent where a decision affecting the allocation of constitutional powers proves, upon mature reflection and experience, to be "unsound in principle and unworkable in practice," and "leads to inconsistent results at the same time that it disserves principles of democratic self-governance." *Roe* is such a case.[10]

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[10] The *Roe* trimester scheme has proven inherently unworkable, making evident the arbitrariness of the lines drawn. The limitation of the state interests in maternal health and unborn life to periods of pregnancy identified by the shifting sands of medical technology makes no sense. As Justice O'Connor has said, "*[P]otential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward . . . . The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting) (emphasis in original). This arbitrariness is further evident in the increasingly complex line drawing in subsequent abortion cases. *Cf., e.g., Simopoulos v. Virginia*, 462 U.S. 506 (1983) (state may require that post-first trimester abortions be performed in a clinic) *with Akron*, 462 U.S. at 437-39 (state may not require that such abortions be performed in a hospital).

The doctrine of stare decisis is " 'a principle of policy and not a mechanical formula.' " *Boys Market, Inc. v. Retail Clerks*, 498 U.S. 235 (1970) (citation omitted). However, as the Court noted in *Vazquez v. Hillery*, 474 U.S. 254, 266 (1986) (citation omitted):

> [T]he careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'

There are several "articulable reasons" why the principle of stare decisis is no obstacle to reconsidering *Roe v. Wade*. *Cf.* Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. Rev. 231, 237 n.39.

First, there is Justice Powell's declaration of a Court duty to "reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-28 (1974) (Powell, J., concurring). *Roe* has been relentlessly criticized, subjected to continuing efforts to rewrite its rationale, and rejected by the co-equal administrative and legislative branches of government. Wardle, *supra*, at 252. Clearly the Court has a duty to reexamine *Roe*.[11]

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[11] The radical departure of *Roe* from the norm of constitutional adjudication was evident in the prompt rejection of its analysis by legal scholars. So much ink has been spilled in the debate over *Roe* that a comprehensive review of the literature is impossible here.

By way of illustration, some are briefly discussed here. John Hart Ely's *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 935 (1973), may be the most insightful discussion of *Roe's* shortcomings as constitutional adjudication. After surveying its logical leaps and lapses, Ely concluded that *Roe* was a "Lochnering" opinion much more dangerous than the previous activist opinions of the Warren Court. *Roe*, he concluded, might be durable, but it was "a very bad decision. Not because it [would] perceptibly weaken the Court . . . and not because it conflict[ed] with [his] idea of progress . . . . It [was] bad because it [was] bad constitutional law, or rather

(Footnote continued)

Second, underlying the doctrine of stare decisis is the principle of consistency, which should require the Court to bring the abortion privacy doctrine into harmony with the rights of the unborn in other contexts. In 1983, Justice Brennan remarked that "the same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat more caution and deliberation, to seek consistency in the interpretation of the law at any given time." *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983).

Roe and its progeny are anomalous across the legal landscape, distorting the "normal rules of law, procedure, and constitutional adjudication" which "suddenly become irrele-

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Footnote 11 continued

because it [was] *not* constitutional law and [gave] almost no sense of an obligation to try to be." *Id.* at 947 (emphasis in original). *Cf.* A. Cox, *The Role of the Supreme Court in American Government* 113-14 (1976).

Alexander Bickel wrote of *Roe*: "One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject." A. Bickel, *The Morality of Consent* 28 (1975). Richard Epstein argued that "*Roe* . . . is symptomatic of the analytical poverty possible in constitutional litigation." Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sp. Ct. Rev. 159, 185.

Two passages from the August, 1979, *Michigan Law Review*, an issue wholly devoted to abortion jurisprudence, summarize the critiques well. In the first, Richard Morgan observed:

> Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court's attempt to justify its conclusions . . . suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function.

Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 Mich. L. Rev. 1724, 1724 (1979).

In the second passage, the editors of the law review, surveying the literature on *Roe*, concluded, "[T]he consensus among legal academics seems to be that, whatever one thinks of the holding, the opinion is unsatisfying." *Editors' Preface*, 77 Mich. L. Rev. (no number) (1979).

The great doubt about *Roe's* validity, and the wide disagreement among scholars on an acceptable substitute for Justice Blackmun's opinion, suggest that *Roe* cannot be satisfactorily modified and should be overruled.

vant solely because a case touches on the subject of abortion." *Danforth*, 428 U.S. at 98 (White, J., concurring and dissenting). Where abortion touches the practice of medicine, the informed consent doctrine is rejected in favor of the older model of physician (and judicial) paternalism, which has itself been rejected in both law and medicine. *Cf. Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972) (recognizing the patient-discretion, informed consent model), *cert. denied*, 409 U.S. 1064 (1972), *with Thornburgh*, 106 S.Ct. at 2190 (Burger, C.J., dissenting) ("If the statute here is to be invalidated, the 'demand' will not even have to be the result of an informed choice.").

A startling inconsistency occurs when an unborn child in one hospital room is being aborted, while in the room next door another unborn patient is being medically treated, with full legal protection, simply because one mother prefers to abort her offspring and the other does not. Rights dependent on the preferences of another are inconsistent with the usual concept of rights. Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. Rev. at 254. "That the attempt of a distressed woman to kill her child shortly after birth is deemed a repugnant criminal act of child abuse or attempted homicide while the attempt of the same woman to kill the same child shortly before birth is deemed a fundamental constitutional liberty is an arbitrary discrepancy too large to ignore," observes Wardle. *Id.*[12]

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[12] *Roe* has had pernicious effects unseen by the *Roe* majority. *Roe's* faulty analysis of fetal rights has had an inhibiting effect on the development of fetal rights in other areas of the law. *See, e.g., Toth v. Goree*, 65 Mich. App. 296, 277 N.W.2d 297 (1976). This effect has been widespread, resulting in the failure of the law regarding the unborn to keep pace with scientific and medical understanding.

Another pernicious effect has been the "slippery slope" effect of *Roe* on other issues regarding legal protection of human life. It was predicted at the time the opinion was announced that the abortion precedent, because of its loose language and lack of constitutional roots, would expand into a precedent for infanticide and euthanasia. *See, e.g.*, Rice, *Dred Scott of the Twentieth Century*, 10 Hous. L. Rev. 1059, 1065-67 (1973). It is arguable that the casual attitude toward the rights of handicapped infants displayed in cases such as the Bloomington, Indiana, "Baby Doe" case is a function of *Roe*. *See*

(Footnote continued)

Third, a reexamination of cases which "marked a significant departure" from precedent is recognized by this Court as especially appropriate. *Id.* at 255 (citing *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627 (Powell, J., concurring); *Monnell v. Department of Social Servs.*, 436 U.S. 658, 695 (1978), and *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 273 (1980) (Stevens, J., plurality opinion)). In the United States, continuous protection of the unborn, by legal restriction of abortion from the period of pregnancy when the science of the day believed that life was present, had been in place from the inception of the nation and centuries before. The unprecedented scholarly outcry over *Roe* is further evidence of the abruptness of the departure of *Roe* from what had gone before.

Fourth, abortion jurisprudence has "deviated substantially from reasonable and workable methods of constitutional analysis," and has, instead, resorted to a rigid formalistic reliance on stare decisis (while, at the same time, gutting *Roe* of content). Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. Rev. at 256. Justice O'Connor observed, in her *Akron* dissent, that "[t]he Court's analysis . . . is inconsistent both with the methods of analysis employed in previous cases dealing with abortion, and with the Court's approach to fundamental rights in other

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Footnote 12 continued

In re the Treatment and Care of Infant Doe, No. GU-8204-004A, slip op. at 2 (Monroe County [Ind.] Cir. Ct., Apr. 12, 1983), Petition for Writ of Mandamus and Prohibition, *denied sub nom.* State of Indiana *ex rel* Infant Doe v. Monroe Circuit Court, No. 482S 140 (Ind. Apr. 14, 1983), *cert. denied*, 104 S. Ct. 394 (1983), *reprinted in* 2 Issues in Law & Med. 77 (1986). The "slippery slope" is also discernible in the attitudes expressed in other cases such as *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395 (D.D.C. 1983) (infanticide), *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986) (suicide), and the "wrongful life" cases in California (*Turpin v. Sortini*, 31 Cal.3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982), and elsewhere.

These developments along with the unforeseen landslide of abortions occurring in this country (about a million and a half a year) and in countries around the world (about fifty million a year), which are heavily influenced by the lead of this Court, argue that *Roe* has led to pernicious results. Therefore, this Court should reconsider *Roe* in light of these developments and the subsequent scholarly light shed upon the subject.

areas." 462 U.S. at 452-53. Lower courts have followed this "regressive formalism," reaching extreme results. Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. Rev. at 257. "When the underlying principles are so unworkable that rigid application of stare decisis results, it is time to reconsider the precedent," argues Wardle. *Id.*

Fifth, "[s]tare decisis has a more limited application when the precedent rests on constitutional grounds, as noted above, because 'correction through legislative action is practically impossible.' " *Washington Gas Light Co.*, 448 U.S. at 272-73 & n.18. The ultimate task of this Court in adjudicating claims of constitutional right is to interpret and apply the Constitution. If a line of cases, upon more mature reflection, appears unconstitutional, the cases must be overruled. Stare decisis is less binding in constitutional adjudication precisely because the Justice's first loyalty must be to the Constitution and not to their prior pronouncements. Of course, where cases such as *Roe* have not been overruled, then such precedent should be followed, including implementation of the state interests declared to be compelling. This has not been done, making the abortion right even more anomalous, absolute, and unconstitutional. The case for overturning *Roe* is more powerful now than when *Roe* was conceived in 1973. *See generally* Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. 231 (setting forth the many reasons why this Court is better equipped to handle the abortion issue now than it was in 1973 and why the constitutional imperative is even more pressing).

Justice Brandeis said that this Court has "often" overruled its prior decisions involving constitutional interpretation. *Burnet v. Colorado Oil and Gas Co.*, 285 U.S. 393, 407 (Brandeis, J., dissenting). In fact, this Court has expressly overruled its precedent over one hundred times, Pfeiffer, "Abandoning Error: Self-Correction by the Supreme Court," in *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* 5 (D. Horan, E. Grant, & P. Cunningham eds. 1987), and it has done so *sub silentio* numerous other times. *Id.* One commentator has observed:

> The practice of overruling error has been defended by the conservative nineteenth century Chief Justice Roger Brooke Tanney and championed by the liberal twentieth century Justice William O. Douglas. The necessity of jettisoning past mistakes is a belief that belongs to the ideology of no party and no faction and is as much an institution accepted by the whole Court as judicial review itself.

Id. at 7.

In sum, this case is well within the factors which this Court analyzes in determining whether reconsideration of a case is appropriate. Such reconsideration is appropriate in this case.

CONCLUSION

Wherefore, Petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the Michigan Court of Appeals.

Respectfully submitted,

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Appendix

TABLE OF CONTENTS

	Page
Mich. Sp. Ct.: Order	1a
App. Court: Order	3a
Trial Court: Stipulated Findings of Fact and Conclusions of Law	7a
Stoker, D.O.: Statement of Medical Judgment	20a

Order

Entered: September 22, 1988

Michigan Supreme Court
Lansing, Michigan

Dorothy Comstock Riley
Chief Justice
[list of justices omitted]

84149

SHAWN KATHLEEN LEWIS,

Plaintiff-Appellee,

v

SC: 841469
COA: 111440
LC: 88-159036-DM

CARLTON JAMES LEWIS,

Defendant-Appellant,

and

GENE MEYERS,

Guardian *ad litem* — Appellant.

Pursuant to this Court's order of September 15, 1988, the parties have filed additional pleadings in order to assist us in deciding whether to grant leave to appeal. We have considered those pleadings and the original application and motions, the Court of Appeals order dated September 15, 1988, and the orders of the trial court.

On order of the Court, the motions for immediate consideration are considered, and they are GRANTED. The applications for leave to appeal are also considered, and they are DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

The motions for stay are also considered. The stay provided for in this Court's order of September 15, 1988, is EXTENDED until 5:00 p.m. Monday, September 26, 1988. In all other respects, the motions for stay are DENIED.

The motion for special admission of foreign counsel is also considered, and it is GRANTED.

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

September 22, 1988 /s/ _____

Corbin R. Davis
Clerk

Court of Appeals, State of Michigan

ORDER

Donald E. Holbrook, Jr.
Presiding Judge

William R. Beasley
Elizabeth A. Weaver*
Judges

SHAWN K. LEWIS v CARLTON J. LEWIS

Docket
111440

L.C. # 88 159036 DM

The Court orders that the motion for immediate consideration is GRANTED.

The Court orders pursuant to MCR 7.205(D)(2) that the lower court's injunction is DISSOLVED, because the injunction interferes with plaintiff's constitutional rights as set forth by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113; 93 S.Ct. 705; 35 L.Ed.2d 147 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 438 U.S. 52; 96 S.Ct. 2831; 49 L.Ed.2d 788 (1976).

The motion to appear and practice is GRANTED.

The motion for immediate consideration of the motion for stay is GRANTED.

The motion to stay the effect of this order is GRANTED and this order is STAYED until 5:00 p.m. Monday, September 19, 1988. No additional bond is required.

This Court retains no further jurisdiction.

*Judge Weaver concurs and states:

The law of the United States Constitution as announced by the United States Supreme Court is binding on trial courts and on appellate courts. That law can be changed in only two ways:

1. The United States Supreme Court can change its opinion;

2. Three-fourths of the state legislatures or state conventions called for said purpose can ratify an amendment to the United States Constitution proposed by two-thirds of both Houses of the United States Congress or proposed by a constitutional convention applied for by two-thirds of the state legislatures. (See U.S. Const. art. V).

The law of the United States Constitution as declared by the United States Supreme Court is clear in this matter. The United States Supreme Court wrote in *Roe v. Wade*, 410 U.S. 113, 163; 93 S.Ct. 705; 35 L.Ed.2d 147, 182 (1973):

> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, 35 L.Ed.2d 174, 175, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. . . .
>
> *"This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine,* ***without regulation by the State,*** *that, in his medical judgment,*[1] *the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effecuated by an abortion* ***free of interference by the State.***

---

[1] In *Roe v. Wade*, *supra*, at 35 L.Ed.2d 177, the United States Supreme Court listed factors involved in the physician's "medical judgment." The Court wrote:

> "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment

(Footnote continued)

"With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb . . . . If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." (emphasis added)

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52; 96 S.Ct. 2831; 49 L.Ed.2d 788, 803 (1976), after noting that *Roe v. Wade* clearly established that "the State may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy," the Supreme Court held that "the State may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy." *Id.* at 805. The Supreme Court said that "the State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.'" (citation omitted).

The trial court concedes at page 11 of its opinion that its injunction does constitute state action. That state action violates the law announced in *Roe v. Wade*, *supra*, and *Planned Parenthood of Central Missouri v. Danforth*, *supra*.

Footnote 1 continued

that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it . . . . [T]he additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation."

Although the issue of abortion raises important moral questions, such questions are not applicable to the decision here. Judges are sworn to uphold the Constitution and laws of the United States. They must apply the law of the United States Constitution as announced by the United States Supreme Court.

For the preservation of a society of laws, not of men, trial courts or appellate courts have no authority to change the law of the United States Constitution as announced by the United States Supreme Court.

SEAL

A true copy entered and certified by Ronald L. Dzierbicki, Chief Clerk, on September 15, 1988

/s/ _____

Ronald L. Dzierbicki
Chief Clerk

A TRUE COPY
John H. Trecha, Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF GENESEE

SHAWN KATHLEEN LEWIS,

Plaintiff,

vs.

CARLTON JAMES LEWIS,

Defendant.

File No. 88-159036-DM

Judge V. Washington

STIPULATED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Arthur C. Swirtz
Attorney for Plaintiff

Steven Moss
Attorney for Defendant

Linda Pylypiw
Shelly Spivack
Attorneys for ACLU

STATEMENT OF FACTS

See Stipulated Facts

Preliminary Statement

A document was presented to the Court at 5:00 p.m. on August 9, 1988 under the format of the spouse abuse injunction set forth in Michigan Compiled Laws 600.2950 and 552.14.

Time being of the essence in terms of the scheduled abortion, the Court signed the injunction in the obvious wrong form to prevent the abortion the following day. Apparently the injunction was served on a number of individuals and the abortion did not occur.

On or about August 17 the Court was contacted by Linda Pylypiw indicating that she was about to enter an Appearance

on behalf of Mrs. Lewis on the issue of the abortion and that she would be working with the American Civil Liberties Union and Attorney Shelly Spivack. A discussion was held in chambers with Attorney Pylypiw and Attorney Moss and it was determined by representations of Attorney Pylypiw that the first pregnancy for Mrs. Lewis had been very difficult and she had been advised medically not to have any more pregnancies. The Court advised Ms. Pylypiw that if this in fact was supported by medical documentation that the restraining order or the injunction would be dissolved on Friday, the 19th before the Court left for an anticipated ten (10) day vacation.

On Friday, the 19th, at approximately 3:00 p.m. Attorney Moss was present in the Court chambers and Ms. Pylypiw was on the speaker phone and it was determined that in fact there was no such medical documentation and the doctor in fact said that it was specifically a social decision as opposed to a medical decision to terminate the pregnancy.

At that time the Court offered Ms. Pylypiw a hearing relative to the issues of whether or not the preliminary injunction/temporary restraining order ought to be dissolved and it was decided that the anticipated return date of the Court of September 6 would be in plenty of time in terms of her client's physical condition to have a decision of the Court on the issue of dissolving the injunction. That being so the Court had no further contact with the case until September 6 when the parties convened at 3:30 p.m. for purposes of a decision. In the interim Briefs were filed on behalf of the Plaintiff and the Defendant as well as a Reply Brief by the Plaintiff. There are some unresolved questions as it relates to the conduct of the parties in this case. In particular they are as follows:

1. How was it that Mr. Lewis found out about Mrs. Lewis being pregnant?

2. Why did Mrs. Lewis share that information with anyone other than her physician when she realized that in fact she was pregnant?

3. Why didn't Mrs. Lewis simply have an abortion rather than talking it over with her husband?

4. Why didn't her attorney of record advise Mrs. Lewis that she could avoid the Court's jurisdiction by voluntarily dismissing her divorce action?

5. Why did Mr. Lewis seek to intervene and prevent Mrs. Lewis from having an abortion — what was his underlying motivation — is this a means of leveraging against the divorce, is this a tactic to prevent her from having the divorce which he obviously does not want.

6. How is that both the parties were able to reconcile periodically without filing a notice a [sic] reconciliation with the Court as provided by 3204(C)?

This failure to inform the Court of the reconciliation is not dispositive of the jurisdictional issue but is certainly something that a higher court may review if it wants and it is merely being pointed out to show that this Court recognizes that there may be jurisdictional ups and downs in this case.

As to the form of the Order that was originally entered it should be redrafted to comply with MCR 3.203 and 3.310 and in particular it should give notice that a hearing will be held relative to whether or not that Temporary Restraining Order should become a Preliminary Injunction on September 6, 1988 @ 3:30 p.m. In particular 3.310(c).

There was a stipulation as to the Statement of Facts set forth above so as to obviate the need for an evidentiary hearing relative to the Court's obligation to make findings of fact.

THE ISSUE PRESENTED

DOES THE STATE CIRCUIT COURT HAVE JURISDICTION AND AUTHORITY TO ENTER AN INJUNCTION PROHIBITING THE FEMALE PARTY IN A PENDING DIVORCE ACTION FROM HAVING AN ABORTION OF A CHILD CONCEIVED BETWEEN THE PARTIES DURING THE PENDENCY OF THE DIVORCE ACTION?

DISCUSSION

The Court's jurisdiction in divorce matters is by function of Statute and our actions are interpreted and directed by Com-

mon Law and Michigan Court Rules. We as trial Court's are not free to allow our personal views to interview [sic] with that which we must do according to the divorce practice within the State of Michigan. That being so, I at this point reference the pertinent divorce statutes and they are MCLA 552.6 where it sets forth the "no-fault" language which must be contained in the Complaint for Divorce and that is specifically that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. It is interesting to note that that same statute in section 1 prohibits the Plaintiff from making any further explanation for the grounds for divorce. At the same time it is set forth in the Michigan Rules of Court under Rule 3.204(a) that the following material must be contained in the Complaint for Divorce:

1. The complete names of the parties and their names before the marriage;

2. The complete names and the dates of birth of any minor children of the parties or children born during the marriage;

3. That their are no minor children of the parties or minor children born during the marriage, if there are none;

4. That the female party is pregnant, if she is;

5. The grounds for divorce or separate maintenance in the statutory language without further particulars;

6. The statutory residence requirements; and

7. Whether there is property to be divided.

It is also interesting to note that as it relates to divorce practice under the instructions that this Court was given at the new Judge's seminar between January 5 and 9, 1987, by the Michigan Judicial Institute that in a specific outline handed out

it was set forth that the proof requirements once the divorce got to Judgment stage should include the following:

1. Jurisdiction;
2. Validity of marriage;
3. Statutory grounds;
4. Whether female is pregnant.

At a special problems outline, page 11.

The divorce statute also goes onto [sic] to speak as to the power of the Court specifically at MCLA 552.12 when it says:

> Suits to annul or affirm a marriage, or for a divorce, should be conducted in the same manner as other suits and courts of equity; and the Court shall have the power to award issues, to degree [sic] costs, and to enforce its decrees, as in other cases.

The divorce statute further continues with the responsibilities of the Court as it relates to the care, custody and support of minor children during the pendency of the action when it states at section MCLA 552.15:

> After the filing of a complaint in an action to annul a marriage or for a divorce or separate maintenance, on the motion of either party or the Friend of the Court, **or on the Court's own motion,** the Court may enter such orders concerning the care, custody, and support of the minor children of the parties during the pendency of the action as the Court considers proper and necessary . . .

Further, the divorce statutes specifically speaks to the Court's requirement upon the entry of Judgment as relates to minor children and it says specifically at MCLA 552.16:

> Upon annuling [sic] a marriage or entering a Judgment of Divorce or Separate Maintenance, the Court may enter such orders as it considers just and proper concerning the care, custody, and support of the minor children of the parties . . .

It appeared that at one point there was a section specifically giving the types of evidence necessary for the taking of a divorce decree and those sections were MCLA 552.40 to 552.42. These were repealed by Public Act of 1961 No. 75, Section 2 effective January 1, 1972.

It is also a requirement that when the issue of custody is raised in any divorce action that the Child Custody Act of 1970 comes into play and that is found at MCLA 722.21. Of particular note is the section that defines "child" under that act, is [sic] as follows. That is found at MCLA 722.22(2)(a): "Child" means minor child and children.

The statute then goes on to define the best interests of the child being the sum total of a group of factors which must be evaluated and determined by the Court and they are found specifically at MCLA 722.23.

The Child Custody Act also requires that the Court make certain determinations as it relates to the rights of the children and that is found specifically at MCLA 722.24 wherein the statute says:

> In all actions now pending or hereafter filed in a Circuit Court involving dispute of custody of a minor child the Court shall declare the inherit [sic] rights of a child and establish the rights and duties as to custody, support, and visitation of a child in accordance with this Act.

The Child Custody Act further requires that the Court give liberal construction to the application of the Act specifically at MCLA 722.26 it says:

> The provisions of this Act being equitable in nature shall be liberally construed and apply [sic] to establish promptly the rights of the child and the rights and duties of the parties involved. This Act shall apply to all Circuit Court child custody disputes and actions whether original or incidental to other actions . . .

Along the same line as it relates to whether the Courts in Michigan and the legislature have looked to the issue of defin-

ing when a fetus becomes a person or a child or whether that child in utero has certain rights has been addressed by the Michigan Supreme Court in the case of *Tyler v. Tyler*, 348 Mich. 169 (1957). The issue in the *Tyler* case was whether or not the Plaintiff, a service man on leave who filed for divorce from his wife, and then withheld the fact that she was pregnant from the Court during the taking of the proofs and then departed for overseas duty could have the Judgment set aside with a provision made for a child who was in fact conceived during that leave. The trial Court made a finding that a man could not come in and submit himself to the Court's jurisdiction and then withhold the fact that the wife was pregnant from the Court and then object to the re-opening of the divorce decree. Specifically, the issue in the *Tyler* case was whether or not the decree could be set aside for the child that was not yet born. The issue was handled by the Court when it stated at page 172:

> We find it unnecessary to consider the various legal points Plaintiff has posed in his Brief. **This is a case where the Court below was under continuing duty to provide for the rights as well as the maintenance of the expected child.** Having been promptly apprised of an urgent fact not theretofore made known to him, that an only child of parties was due for birth without provision for such child having been made in the decree — the chancellor was duly empowered by the motion as filed and served on counsel of record to vacate the decree and its supporting order pro confesso. **Indeed, if he had been so minded, the chancellor for an abundant reason could have ordered a rehearing on his own motion.** *Tyler v. Tyler*, 348 Mich. 169 at 172. Emphasis supplied, citation omitted.

There is further finding in the Statutes of Michigan that an unborn person is to be given certain rights specifically in the Revised Judicature Act found at MCLA 600.2045 Section 1:

> If in an action or proceeding, other than one in Probate Court, it appears that a person not in being may become entitled to a property interest, real or personal, legal or equitable, involved in or affected by the action or proceeding, and the interests of the unborn person is not or cannot

> otherwise properly be represented and protected, the Court, **upon its own motion,** or upon the motion of any party, may appoint a suitable person to appear and act of [sic] Guardian Ad Litem of the unborn person. The Guardian Ad Litem is authorized to engage counsel and do whatever is necessary to defend and protect the interests of the unborn person. A Judgment or order made after the appointment shall be conclusive upon the unborn person for whom a Guardian was appointed.

I have taken the time to enumerate the standards set forth under divorce proceedings because I think it is very important in a case that deals with the highly emotional issue of abortion to set the parameters so that people know exactly what is being ordered, and what is not being ordered.

The Plaintiff in this case is raising several issues in her Brief. She states that she one was served with an imperfect order. That has [sic] conceded and will be corrected in short order. However, the substantive arguments are that there is no right on behalf of the State to interfere in the decision to terminate a pregnancy during the first trimester. She relies heavily on *Roe v. Wade*, 410 U.S. 113; 93 S.Ct. 705; 35 L.Ed 2d 147 (1973), which according to Plaintiff held that a woman's decision whether or not to terminate her pregnancy is protected by the right of privacy founded in the 14th Amendment of the United States Constitution and no State may interfere in that decision. That interpretation is an overly broad reading of what was found in *Roe v. Wade*. I went through and re-read that case several times and its holding specifically states that a State may not set forth criminal abortion statutes that are overly broad in nature, that is not making a distinction between the first trimester and second and third trimesters of a woman's pregnancy and it speaks specifically to State regulation by way of statute. The only issue or the only section of the holding which may give some basis to Plaintiff's position is that set forth at Subsection A which states:

> For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must

be left to the medical judgment of the pregnant woman's attending physician.

That section of the holding if taken out of context would appear to abrogate the finding in *Tyler v. Tyler, supra*, and the provisions of MCLA 600.2045 as well as the inferential responsibilities placed in the trial Court by the Child Custody Act of 1970 and the divorce statutes, and Michigan Court Rule 3.204.

However, if that Subsection is read in the total context of the decision it is clear that the high Court was speaking of statutory regulation and not merely State action. A position that Plaintiff makes in her Brief at page 10 is that the State Court injunction does constitute State action, that is not disputed by this trial Court. This trial Court's position is that it is caught in a quandry between the United States Supreme Court, and its decision in *Roe v. Wade* whether or not it applies to actions by the judiciary since that was not specifically addressed, the findings in *Tyler v. Tyler* that the Court was under a continuing duty to make provisions for the expectant child; indeed in the *Tyler* case in the research headnote which is not cited for authorative purposes but merely for research availability including shepardizing, it is interesting to note that the holding is set forth as earlier recited, but there is also a reference to Court Rule No. 28 Section 4 (1945) which would indicate again an existing Supreme Court Court [sic] Rule governing the issue of unborn children.

The issue of whether or not *Roe v. Wade* specifically overruled the holding in *Tyler v. Tyler* was addressed at least in this Court's mind by the Shepardizing of the *Tyler* decision. Obviously, *Tyler* was an earlier decision than *Roe v. Wade* and if in fact it was overruled by that narrow Subsection A of the Supreme Court's holding then indeed that would have been set forth in the *Shephard's* citations. That is not found by this Court on its review of the citations. Thus, the most logical conclusion is that the United States Supreme Court was addressing the issue of the State regulation in the form of Statute and not addressing the issue as it related to a Common Law decision.

The Defendant makes an interesting observation in terms of how a child is defined, however, as we see in the Child Custody Act, a child has a very broad definition. If we take the ordinary meaning as found in Webster's Third New International Dictionary Unabridged 1961 Edition, adopted from page 9 of Defendant's Brief, we note that unborn or recently born human beings are defined as "children". This was apparently reaffirmed in Webster's Ninth New Collegiate Dictionary of 1974, "an unborn or recently born person". Apparently this was further adopted in Black's Law Dictionary Fifth Edition 1979 which defines child as an unborn or recently born human being.

It is clear to this Court that there has to be some sort of willingness by the highest Court in the State of Michigan and perhaps the United States Supreme Court to address the issue of divorce law and the responsibility of the Court verses [sic] the private rights of the individuals. In this Court's view this is not a case of mother's right to terminate pregnancy verses [sic] father's rights to veto pregnancy, thus I have not addressed the issues set forth in the *Planned Parenthood v. Danforth* case (citation omitted).[1] I don't think that is the issue here. As I look at the issue the parties in this case submitted themselves to the jurisdiction of the Court under the cloak of the Divorce Statute, Common Law, and Michigan Court Rules. Once that occurred an additional responsibility was placed on the Court to look into the interests of any minor children that the parties may have. Clearly, the parties did not at the time of filing have more than one minor child. As this Court is able to research it, on short notice, it appears that there is a wide open view as to what constitutes a child. Under present Michigan Law, statutory, case law, and Court rule. [sic] Why would the Michigan Court Rules, as set down by the Michigan Supreme Court make counsel place in the Complaint whether or not the female is

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[1] Nor the other issues raised by Plaintiff in her Brief as I do not feel they need to be addressed within the narrow context of this Court's Opinion, as to the issue presented for analysis.

pregnant? Why, if there is to be no intervention would the Judicial Institute tell new Judges as of 1987 that they must have proof that the female is not pregnant? These questions are not answered directly. They need to be!

People should know specifically how the legislature is defining a minor child. Conversely, they need to know why and whether or not there will be intervention on behalf of the Court if a child is conceived during the course of a marriage. This is not the case where the parties were estranged and there was a conception by someone other than the parties. This is a case that falls, in this Court's view squarely within the jurisdiction of divorce proceedings, and this Court is going to preserve the status quo until it is given direction from a higher court, preferably the Michigan Supreme Court as it is their Court Rule that inferentially gives the trial Court the responsibility to look after the interests of an unborn child, and their earlier *Tyler* decision that says there is a continuing duty as it relates to the rights and maintenance of an expected child, but gives no definition of that duty.

I am not getting into the issue of how other areas of Michigan Law treat the fetus. Although I do note for the record that it appears that there is some consideration of what happens to a child in utero as was decided *in the Matter of Baby X* [,] 97 Mich. Appeals 111 (1980), and in the tort area as set forth in *Womack v. Buchhorn*, 384 Mich. 718 (1971), and *O'Neal* [sic] *v. Morris*, 385 Mich. 130 (1971), and it appears that at least that at one point one of the Supreme Court Justices was of the opinion that there needs to be a judicial determination of personhood of the unborn. See *Kilpatrick v. St. Joseph Hospital*, (Docket #61528). That would have been specifically Justice Ryan in a dissenting Opinion on that application found at 409 Mich. 868, wherein he says:

> Judicial determination of the personhood of the unborn is a vitally important question of highest juris prudential [sic] significance. The law on this question is unclear and apparently contradictory. See *Tunnicliffe v. Bay City's*

Consolidated Rail Co. 102 Mich. 624; 61 N.W. 11 (1894); *O'Neal* [sic] *v. Morris*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Toft* [sic] *v. Goree*, 65 Mich. Appeals 296; 237 N.W.2d 297 (1975); *Roe v. Wade*, 410 U.S. 113; 93 Sup. Ct. 705; 35 L.Ed.2d 147 (1973).

In that case the issue was whether or not a thirteen week old fetus was a person. If so, then he felt that further oral argument and briefing were indicated. Because the question was whether or not the mother and father in a common law negligence action could claim damages for the loss of society and companionship of a thirteen week old fetus which was aborted due to alleged negligently [sic] injury inflicted by the Defendant upon Plaintiff mother and proximately causing the abortion.

CONCLUSION

As all can see this is not a case where we have simply two people who happen to create a fetus. What we have are two people who have come under the jurisdiction of the Divorce Statutes, Case Law, and Court Rules. Because of that, they are in a unique position as it relates to the issue of terminating a pregnancy. As this Court reads the various cases, and statutes, and Court Rules, the inference is quite clear, if not the absolute direction, and that is, if there is a child conceived during the term of the marriage while the divorce is pending that divorce cannot be concluded until provisions are made for that child. Specifically, when you look at the Revised Judicature Act, MCL 600.2045, the issue becomes whether or not that child once conceived then is entitled to birth without outside interference.

That question is not one which apparently has been posed or answered in any case that this Court is able to research and uncover. Because of that, I am not dissolving the Temporary Restraining Order of 8/9/88. I am making it a Preliminary Injunction from this point forward directing that the form of the original Injunction be modified to resemble that of a Tempo-

rary Restraining Order Nun [sic] Pro Tunc to August 9, 1988, and will gladly certified [sic] this issue to the higher Appellate Courts, at the parties [sic] pleasure to the Court of Appeals, more appropriately to the Michigan Supreme Court.

Further, I hereby appointed Attorney Gene Myers as Guardian Ad Litem for this child during the pendency of this matter.

IT IS SO ORDERED, AND THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL THERE BEING NO JUST CAUSE FOR DELAY.

/s/ _____
Valdemar L. Washington
Circuit Court Judge

Dated: September 6, 1988

VALLEY MEDICAL CENTER
John L. Stoker, D.O.
5142 Miller Rd.
Flint, Mi. 48507

NAME: Cari Ann

DATE: 8-18-87

Totally Incapacitated: _____

Partially Incapacitated: X

From _____ Thru _____

It is in mental
deficiency and a medical
decision for a TAP
with this patient.

SIGNED: John L. Stoker DO

JOHN L. STOKER, D.O.